

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE

JI SHIANG, INC.

and

Case No. 29-CA-29927

LOCAL 318, RESTAURANT WORKERS' UNION

*James Kearns, Esq.*, of Brooklyn, NY for the General  
Counsel.

*Douglas Rowe, Esq.*, (Certilman Balin) of East  
Meadow, NY for the Respondent.

*Amy Tai, Esq.*, (Urban Justice Center) of New York,  
NY for the Charging Party and the discriminatees.

**DECISION**

**Statement of Case**

Steven Fish, Administrative Law Judge: Pursuant to a charge filed by Local 318, Restaurant Workers' Union, herein called the Union, the Director for Region 29 issued a Complaint and Notice of Hearing on February 25, 2010 alleging that Ji Shiang Inc., herein called the Respondent, refused to consider for hire or hire Xiao Hong Zheng (Zheng) and Li Rong Gao (Gao) on June 2, 2009<sup>1</sup> because they sought assistance from the Union and engaged in concerted activities in violation of Sections 8(a)(1) and (3) of the Act.

The trial with respect to the allegations in said complaint was held before me on May 5 and 6, 2010 in Brooklyn, NY. Briefs have been filed and have been carefully considered.

Based upon the entire record, including my observation of the demeanor of the witnesses, I make the following:

**Findings of Facts**

**I. Jurisdiction**

Respondent is a corporation since June 3, 2009 with its principal place of business in Flushing, NY, where it is engaged in the operation of a restaurant.

Since commencing operations on June 3, Respondent has derived gross revenues in excess of \$500,000 and on a projected basis for the twelve month period commencing on or about June 3, 2009 will annually purchase and received at its Flushing facility goods and materials valued in excess of \$5,000 directly from suppliers located outside the state of New

---

<sup>1</sup> All dates hereinafter are in 2009, unless otherwise indicated.

York.

It is admitted, and I so find, that the Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

5

## II. Labor Organization

Fong Chun Tsai, Vice-President of the Union, testified that the Union represents employees of various restaurants and is currently negotiating terms of collective bargaining agreements with said restaurants on behalf of such employees. Tsai further testified that employees participate in the union meetings and vote in internal union elections.

10

Based on the above, I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

15

## III. Facts

Zheng and Gao were both employed at the predecessor restaurant, Guang Zhou, located at the same address as Respondent. Zheng was a waitress from June 8, 2007 to February 2008 when she was promoted to captain. She worked 6 days a week from 9:00 a.m. to 10:00 p.m. She earned \$400 per month in cash plus tips as a waitress and \$600 per month plus tips as a captain.

20

Gao was employed as a waitress starting in April 2008. She also worked 6 days a week at a salary of \$400 per month plus tips. She worked from 9:00 a.m. or 10:00 a.m. to 10:00 p.m. on Wednesday through Sunday. She also worked on Tuesdays but the record is unclear as to her hours on that day.

25

Guang Zhou Restaurant was owned by Zheng Jing Zhen (Zhen), known as "Jackie." His wife, Wong Sai Lee (Lee), also worked at the restaurant and distributed salaries to the employees. Lee's sister is married to Feng Lin (Lin), who was employed at Guang Zhou as a captain.

30

Cheuk Ping Chen (Ping) was also employed by the Guang Zhou Restaurant as a captain.

35

Captains served customers as did the waitstaff but had the additional responsibility of coordinating banquets and parties. Captains also wear suits and ties and are referred to as "blackshirts."

40

After Kevin ---, who had been employed by Guang Zhou as manager, left, it did not hire a replacement. Rather it divided up Kevin's responsibilities among the captains, particularly Ping and Lin. In that regard, Lin and Ping hired and fired employees, set schedules, increased wages and decided how tips would be divided. The employees considered Ping and Lin to be managers of Guang Zhou.<sup>2</sup>

45

<sup>2</sup> These findings are based on the credible and mutually corroborative testimony of Gao and Zheng. In that regard, they observed Lin and Ping hiring specific employees and increasing rates of employees and that Lin and Ping jointly decided on how tips of employees are to be distributed. Gao testified that after Kevin left, Lin and Ping assigned tables to the waitstaff, arranged work schedules and hired and fired employees. Kevin consulted with Lin before hiring

50

Continued

Tips were pooled and divided up among the waitstaff, plus other employees, including the captains.

5 In 2008, Gao and Zheng discussed the fact that they were unhappy about the employer taking part of their tips as well as other problems, such as long hours and the failure of the employer to pay them minimum wage or overtime. In July 2008, Gao and Zheng discussed with a former co-worker, “Sammy,” going to the Union to learn more about protecting their rights.

10 “Sammy” had previous cases with other restaurants involving these issues and the Union was involved. These restaurants were Domico and East Buffet. On July 31, 2008, the Board issued a decision in *East Buffet & Restaurant*, 352 NLRB 975 (2008) affirming the decision of an administrative law judge that the employer violated Section 8(a)(1) and (3) of the Act by discharging one employee, refusing to reinstate 8 employees, who engaged in an unfair  
15 labor practice strike in protest of that discharge, and various other 8(a)(1) violations. The decision related that employees complained among themselves and to management about various conditions of employment, including underpayment of wages, overtime and meal policies of the restaurant for employees, and eventually contacted Local 318 (the same union as in the instant case) about the problems. Further, two of the discriminatees therein became  
20 plaintiffs in a lawsuit against East Buffet seeking more than one million dollars in damages for underpayment of wages and other claims.

Sammy suggested that the employees go to the Union. Gao and Zheng agreed that Zheng would go to the Union and discuss their complaints with Union representatives. On July  
25 2, 2008, Zheng visited the Union’s offices and spoke to Tsai. She informed Tsai that the employer did not pay employees minimum rates and that the managers were sharing tips with employees. Tsai explained to her that this conduct is prohibited and that she should discuss it with other employees and see if they were interested in the Union. Tsai asked her to fill out a membership card for the Union. She did so on that date.

30 When Zheng returned from her visit at the Union, she reported to Gao what Tsai had said to her and told Gao that if the employees join the Union, the Union will help the employees improve their work environment and get their rights, such as minimum wage, overtime, payments and no hours and the employer not taking part of their tips. They decided to try to  
35 speak to other employees about joining the Union and helping them to obtain their rights. Subsequently, both Gao and Zheng spoke to several members of Guang Zhou’s waitstaff. They told their fellow employees that they should join the Union in order to fight for their rights and to get the employer to compensate them properly, including overtime pay and to stop it from getting part of their tips. The employees indicated to both Gao and Zheng that they were afraid  
40 to join the Union because they feared losing their jobs. Since Zheng and Gao were not able to obtain any other union supporters, they decided to “put the matter aside.”

In late 2008 and early 2009, Gao complained to both Lin and Ping about the long hours that she is working and the failure of the employer to pay overtime. She asked for a change of  
45 schedule to reduce her hours. Both Ping and Lin told her that no one else was complaining and

her. Further, Gao testified (undenied by Lin) that Lin told her that he (Lin) had hired a busboy and a dishwasher and that he had made the decision to fire a busboy, dishwasher and waitress. I credit this testimony over Lin’s assertion that he was merely communicating a decision made  
50 by the owner to fire or hire employees. Therefore, I find that Lin and Ping were supervisors under Section 2(11) of the Act and agents under 2(13) of the Act of Guang Zhou.

everyone worked the same schedules. Thus, Gao's request to change her schedule was denied.

5 In February 2009, Gao and Zheng discussed the fact that conditions did not improve and decided to again try to convince their fellow workers to support the Union to help them obtain minimum wage and to stop the employer from taking tips from the employees. Once again, both Gao and Zheng spoke to their fellow employees about these matters at the restaurant. Once more, the employees told Gao and Zheng that they were afraid to join the Union because they feared losing their jobs. Although both Ping and Lin were in the restaurant when Gao and Zheng engaged in the conversations with the other employees about the Union and about their complaints about overtime hours and tips, neither Lin nor Ping were close enough to hear any of the discussions in 2008 or 2009.

15 In April 2009, Lee, who is, as noted, the wife of the owner and the sister-in-law of Lin, asked Gao if the restaurant, Domico,<sup>3</sup> was sued by the Union. Gao replied that she wasn't sure but that she thinks that in order to bring a lawsuit, you need at least three people.<sup>4</sup>

20 In May, Lin approached Zheng and asked, "Did you do anything wrong to the company?" Before Zheng could respond, Lin added, "I know Gao Li Rong went to the Union and made a complaint against the company." Zheng made no response. Lin continued, "You don't have to say anything. I know."

25 Shortly after this conversation, Gao was not present at the restaurant because it was her day off. Gao's brother-in-law, who had previously been employed at the restaurant, came into the restaurant. Zheng asked Lin if she could give the brother-in-law of Gao free coffee. Lin responded that he had already allowed Gao's relative, the brother-in-law, to work at the restaurant and Gao had "went to the Union to make a complaint against me. I did not retaliate and you want me to give him free coffee?" Zheng made no response.<sup>5</sup>

30 On June 1, "Jackie" held a meeting with Guang Zhou's employees and announced that the restaurant would be transferred to Lin. "Jackie" instructed the employees to return the following day with documentation to apply for a job. Lin spoke and stated that he hoped that he would get help from everyone to improve the restaurant. He urged all employees to bring their documentation the following day and fill out an application.

35 After the meeting, a group of employees, including Gao and Zheng, as well as Ping, went to a different restaurant together to meet, eat and discuss the developments. At this restaurant, Gao mentioned that it was unfair for the employer to close the restaurant and suggested that the employees go to the Union together to help in obtaining job security for

40 <sup>3</sup> Domico, as noted above, is the name of a restaurant where Gao's friend, "Sammy," who had informed her about the Union, was employed.

45 <sup>4</sup> Lin denied that he was ever told by Lee, his wife's sister (the wife of the owner), that she had a discussion with Gao, in which she asked Gao if a different restaurant had been sued by the Union. Lee did not testify.

50 <sup>5</sup> My findings with respect to these two conversations between Zheng and Lin are based on the credited testimony of Zheng. While Lin denied asking Zheng if she did anything wrong to the company or telling her that Gao had gone to the Union to complain about the company, I do not credit these denials. Notably, Lin did not deny Zheng's testimony about Gao's brother-in-law, as related above, or that he had told Zheng during this incident that Gao had gone "to the Union to make a complaint against me."

everyone. Zheng stated that she agreed with Gao that the employees should go together to the Union. One or two other employees agreed but most of those present said that they should wait and see what happens tomorrow. Ping said, “I don’t even know if I will be rehired.”

5 The following day, June 2, Zheng, Gao and the other employees went to the restaurant and met with Lin. They brought in their social security cards, passports and other documents and filled out applications and W-2 forms. Lin told the employees that if they were hired, there would be a three-month probation period. He instructed the applicants to leave, and that he would call them and let them know if they were hired.

10 Later that day, Zheng received a call from the restaurant and was told to come in to pick-up her vacation pay. She went to the restaurant and Lee (the former owner’s wife) gave her an envelope containing her vacation pay. While there, Zheng noticed that a number of the prior employees were working. She asked one of the former employees how come she was working. 15 That individual told Zheng that Lin had called her and asked her to come back to work. Zheng returned home, waited a while and received no call from Lin. She called Gao and asked her if she had received a call from Lin. Gao said no. At about 11:00 p.m., Zheng called Lin. She asked Lin how come that everyone else had been returned to work except herself and Gao. Lin replied, “Why should I hire you? You and Gao Li Rong went to the Union, made a compliant 20 against the company. Why should I hire you?” Zheng made no response. Zheng then telephoned Gao and informed her that Lin had told Zheng about the failure to hire Zheng and Gao.

25 The above findings concerning the conversation between Zheng and Lin are based on the credible testimony of Zheng. She testified consistently on direct testimony and on examination by the undersigned concerning the conversation. Further, Gao implicitly corroborated Zheng’s testimony inasmuch as Zheng informed Gao immediately about Lin’s comments. While Lin denied making the statement about Gao and Zheng going to the Union, I found his denials unpersuasive. Notably, even in his version of the conversation, he admits 30 telling Zheng, “You know what you have done,” when she asked why she was not rehired. This vague comment could readily be construed as referring to union activities, particularly since Lin did explain what she “had done” to justify Respondent’s refusal to hire her. Also, Lin testified that he told Zheng that he hadn’t “decided yet” whether to rehire her. This testimony is completely contrary to his own earlier testimony that he had decided not to hire Zheng and Gao 35 prior to the transfer. It is also inconsistent with his own alleged comments of “You know what you have done.”

40 Accordingly, based on the above reasons as well as comparative demeanor considerations, I credit Zheng’s version on the conversation of June 2, as detailed above.

45 Lin testified on behalf of Respondent and described his alleged reasons for not hiring Gao and Zheng. According to Lin, he had made up his mind not to rehire Zheng and Gao prior to the transfer for a number of reasons. He also testified that he did not consult with anyone concerning his decision, including the other captains (such as Ping), whom he hired.

50 Lin testified on direct that he did not hire Zheng because “sometimes, when she works, she would not be very diligent and sometimes, she would go to the bathroom and make a phone call and sometimes, I would not be able to find her.” “Also, once, she had a verbal argument with a manager... and very often she talks behind people’s back and gossip.” Lin provided no details about these alleged problems with Zheng’s work during her tenure as an employee of Guang Zhou. Lin also admits that he never spoke to her about any of these alleged deficiencies in her work performance while they were employed together at Guang Zhou.

Respondent's Answer stated that Zheng was not hired "because of her bad service attitude and she was 'not nice' to work with her other co-workers and frequently yelled and screamed at other co-workers during working hours in front of customers."

5

Lin testified that he did not hire Gao for the following reasons:

10

"She would not pay a lot of attention to her own behaviors. There were times at the tea station, she would spit into the sink at the tea station. And, she likes to gamble. When she lost money, she would return from gambling, she would be very – she would not be very – she would not have a lot of energy working. And, there was once during a night shift, prior to the end of the shift, inside the VIP room, there was customer that asked her to have a drink. And, she would have those drinks. And, when she'd come out, her face would be red. And, there was another time – One time – There was one time, she told her brother-in-law to make threats against one of her co-workers that after that person get off from work, he would get beaten up."

15

20

On cross-examination, Lin furnished some additional details concerning his alleged problems with Gao's performance. Lin mentioned an incident, sometime in 2008, where Gao had written an order in the kitchen and then started eating the food. Lin spoke to Gao about this, and she told him that she had forgotten to pay for the food. Lin also testified concerning Gao's drinking on the job that although he never actually saw Gao drinking that he did observe her coming out of a room, where customers were drinking. When Gao came out of the room, Lin testified that he noticed that her "face was very flush" and customers came out of the room, grabbed Gao and said "Come back in. Let's have another drink."

25

30

Lin was also asked about his assertion that Gao had allegedly told her brother-in-law to make a threat against one of her co-workers. According to Lin, sometime in 2008, he observed an employee talking with the boss (Jackie) and telling Jackie that Gao's brother-in-law had threatened him after telling this individual, who had previously corrected Gao's behaviors, not to do so and allegedly said to this individual that "after work I will wait for you." Lin admitted that he did not hear Gao say anything to her brother-in-law about threatening this employee.

35

40

With respect to Gao's gambling, Lin testified that Gao would gamble at work playing mahjong and pica with other employees, and at times, Lin would gamble along with her. The gambling occurred at the restaurant at times when the restaurant was closed. However, Lin testified that in his view, Gao gambled "too high," and that he had spoken to her about it and said to her "if you lose, you know, a lot of money, what are you going to do?" According to Lin, while other employees were also gambling at the time, Gao was acting as the "house" in that game of pica so she could lose a lot more money than the other players. When asked how Gao's gambling affected her work, Lin testified that when Gao lost money "you could tell that she was not happy" and she "would just stand there, like no energy."

45

Respondent's Answer asserted, as follows, in explaining the reasons why it did not hire Gao:

50

Ms. Li Rong Gao was not hired as a "waitress" because of her bad service attitude, her "drinking and gambling problems", which affected and interfered with her job

performance, and her failure to possess proper legal documentation to work in the United States. Upon information, her employment authorization was to expire on January 15, 2010 and she could not provide two pieces of identification to legally work in the United States.

Respondent, by its attorney, also filed two position papers in connection with the investigation of the charges. The first such document states, as follows, concerning the reasons for Respondent's refusal to employ Gao and Zheng:

Please provide the reason why Mr. Lin failed to employ Li Rong Gao and Ziao Hong Zheng

Gao and Zheng were not hired for the reasons that they did not have the required qualifications for the job, mainly, a good attitude and personality, good appearance and being a team player or hard worker. Specifically, many of the other "existing" employees complained to Mr. Lin directly that Gao and Zheng were not "nice", were "lazy" and that they "yelled" and "screamed" at the other staff. In addition, Mr. Lin was told by a few employees that Gao had both a drinking problem and a gambling problem, which affected her work.

A little more than a month later, Respondent's attorney supplemented its prior position paper by another letter, in which it added another reason for its decision not to consider Gao:

Further, supplementing our previous statements, our client did not consider Ms. Gao for the position due to the fact that Ms. Gao did not possess the proper legal documentation to work in the United States as her employment authorization expired on or about January 15, 2010. She could not provide two pieces of Identification to legally work in the United States.

Respondent also called as witnesses, two of the captains that it hired, who had been employed along with Lin and the discriminatees at Guang Zhou. Shun Wei Wu was employed by Guang Zhou as a waiter and then became a captain in late 2007 at the same time that Zheng was promoted to that position. Wu testified that Zheng "did not work at the assigned post...and she did not get along with some of her co-workers." Specifically, Wu testified that he was once at a party and he saw a co-worker crying, and the co-workers told Wu that Gao and Zheng "the two [of] them were taking advantage of her."<sup>6</sup>

Wu also testified that as for Gao, "When she works her attitude is not very good." Wu added that when Gao worked, she would "lean against the wall" and that "she lost money in gambling. Her feelings were not very good and it affected her work." Wu did not testify how the gambling affected Gao's work.

Chi Kong Leung was also promoted to captain along with Zheng and Wu in late 2007.

---

<sup>6</sup> Wu did not testify as to when and where this event took place or what the discriminatees had done to "take advantage of" the employee involved. Wu also did not testify whether he ever informed Lin about the incident.

Leung testified that Zheng “was not very attentive” when she takes orders and “when she’s working she often eats.” Lueng also asserted that Zheng “got moody when she works” and “often she will argue with co-workers.”

5           Leung also testified that Gao’s “working attitude was very lax” and that “Gao gambles and she lost money, after that it affects her attitude and she gets moody.” Leung also claims that he saw Gao spit in the drinking fountain and that he told Gao not to do it because it was used by a lot of people and she should not do that.

10           Leung additionally testified that Gao often eats during working hours, and that he (Leung) told Gao that it was not professional to eat in front of customers and that it was against the rules of the restaurant.

15           Leung also provided testimony that both Gao and Zheng complained to him about increasing the amount of tips received by the two employees and about the fact that Ping, who Gao and Zheng considered to be a manager, was taking part of their tips. Leung responded to both Gao and Zheng that Ping is a captain, not a manager, just like Leung. Leung informed Lin that Gao and Zheng has complained to him about Ping receiving part of the tips and commented that if Ping is a manager, he doesn’t have to serve any customers. Lin replied that  
20           Ping is a captain and that he (Leung) should just ignore the employees.

          During the employees’ conversation with Leung, they told him that they were going to complain about the tips “to the company.” Leung added that he started to “hate” Gao and Zheng because of their constant complaints. More specifically Leung testified:

25                               “Because they keep on coming back and telling me about these things. I tell them just do your job, I told them you are also Captains you should do your own duty right and not you go join  
30                               Ms. Gao to mess around with the company. It’s going to affect other employees’ attitude.

                              So as a Captain it’s not very professional what you do.  
                              Then she was mad and then she just don’t talk to me.”

35           Lin also testified that as a new employer, Respondent hired approximately 40 employees, most of whom who had been employed by Guang Zhou. This included waitstaff, captains, kitchen employees, bus boys and dim sum employees. Respondent hired as a manager, Wo Ti Gung, who had not been employed by Guang Zhou. As I noted above, Lin testified that he had made up his mind not to hire Gao and Zheng prior to the transfer for the  
40           reasons that he testified to, which have been detailed above.

          Lin testified that he also decided not to hire another waitress, Xuan Xian, because he felt that he did not need that employee. According to Lin, Guang Zhou employed seven waiters and waitresses. He decided not to hire Gao and Xian, so he hired five former waitstaff, plus a new  
45           employee, who applied. Subsequently, one of the waitstaff was fired, so Lin testified that he hired Xian.

          As for captains, Guang Zhou employed five captains, including Lin himself and Zheng. Respondent hired three of the prior captains, all but Zheng.<sup>7</sup>

50                               

---

<sup>7</sup> Lin himself was now an owner.



Respondent also hired everyone of the prior kitchen staff, bus boys and dim sum employees, who had been employed by Guang Zhou.

5 Further, the record reveals that Zheng went past the restaurant on June 7 and noticed a sign indicating that Respondent was still seeking to hire waitresses or waiters.

Finally, the parties stipulated that Gao submitted to Respondent on June 2 a copy of her social security card and her employment authorization card from the U.S. Department of  
10 Homeland Security, which expires January 15, 2010.

#### IV. Analysis

15 In *FES*, 331 NLRB 9 (2000), enfd. 301 F.3d 83 (3<sup>rd</sup> Cir. 2002), the Board detailed its analytical approach to refusal to hire and refusal to consider for hire cases utilizing burdens set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982).

20 The *FES* criteria are summarized by the Board in *Wayne Erecting Inc.*, 333 NLRB 1212 (2001):

25 In *FES*, the Board set forth the framework for analysis of both refusal-to-hire and refusal-to-consider allegations. In order to establish a discriminatory refusal-to-consider violation under the *FES* framework, the General Counsel must show:

30 (1) that the respondent excluded applicants from a hiring process; and (2) that antiunion animus contributed to the decision not to consider the applicant for employment.

In order to establish a discriminatory refusal-to-hire violation, the General Counsel must establish the following elements:

35 (1) that the respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicants had experience or training relevant to the announced or generally known requirements of the positions for hire, or in  
40 the alternative, that the employer has not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that  
45 antiunion animus contributed to the decision not to hire the applicants.

Id, footnotes omitted.

50 In *Planned Building Services*, 347 NLRB 670 (2006), the Board modified its approach to refusal to hire allegations that arise in a successorship context. In such cases, the Board decided to utilize a strict *Wright Line* analysis and would not require the General Counsel to establish as part of its *prima facie* case, as in *FES*, that the employer was hiring or had plans to

hire or that the discriminatees were qualified for the positions involved. This modification of *FES* was made since in a successorship situation the predecessor's employees presumptively meet the successor's qualifications for hire. Since the successor's business is generally a continuation of the predecessor's business, it follows that the predecessor's employees if hired by the successor ordinarily would continue to perform essentially the same work as they did for the predecessor. Therefore, the Board held that "it serves no purpose to require the General Counsel to demonstrate in each successorship case that the employees have relevant experience or training for essentially the same job in the successor's work force that they performed in the predecessor's work force." 347 NLRB at 673.

Further, the Board observed that "because a successor employee must fill vacant positions in starting up its business, it is similarly of little use to require General Counsel to demonstrate that the employer was hiring or had concrete plans to hire." *Id.*

Therefore, the Board held that to establish a violation in cases where a refusal to hire is alleged in a successorship context, the General Counsel has the burden to prove that the employer failed to hire employees of its predecessor and was motivated by union animus. *Id.*

Once the General Counsel has shown that the employer has failed to hire employees of its predecessor and was motivated by antiunion animus, the burden then shifts to the employer to prove that it would not have hired the predecessor's employees even in the absence of its unlawful motives. 347 NLRB at 674.

Here, the parties litigated and briefed the instant case under a *FES* analysis although in my view, *PBS* is more appropriate since the discrimination arose in a successorship context. Nonetheless, the distinctions between *FES* and *PBS* are inconsequential here since there is no dispute that Respondent was hiring and that both discriminatees had the relevant experience and training for the same jobs in Respondent's work force that they had performed in the work force of Guang Zhou.<sup>8</sup>

Thus, whether the analysis of *FES* or *PBS* is utilized, the critical issues here are whether the Respondent refused to consider Zheng and Gao for hire and whether animus toward protected conduct contributed to the decision not to consider them for employment, and whether such animus also contributed to the decision not to hire them (*FES*) or whether Respondent's failure to hire the discriminatees was motivated by animus towards protected conduct (*PBS*). Thus, there is no significant difference here between the two analytical approaches towards resolving the refusal to hire cases.

Turning to these issues, it first must be decided if Respondent refused to consider Zheng or Gao for hire. The Board defines this as requiring proof that the Respondent "excluded applicants from the hiring process." *FES* at 15; *Wayne Erecting*, *supra* at 1212. It is not clear here whether this fact has been established since Respondent did not technically exclude the discriminatees from the hiring process since it allowed them to file applications. However, since Lin testified that he had made up his mind not to hire both Zheng and Gao before he permitted them to apply, the application process *vis a vis* Zheng and Gao was a sham. Thus, they were, based up Lin's own testimony, excluded from the hiring process.

Further, the refusal to consider allegations here have little remedial significance since there were clearly sufficient openings when the Respondent staffed its operations that Zheng

---

<sup>8</sup> Captain for Zheng and waitress for Gao.

and Gao could have filled. Therefore, while it is not essential for me to decide the refusal to consider allegations in these circumstances, I shall nonetheless do so since the relevant issues are the same to decide both the refusal to consider and refusal to hire issues. They are whether animus by Respondent towards protected conduct contributed to the decision not to hire Zheng and Gao, and if so, whether Respondent has met its burden of establishing that it would not have considered or hired the discriminatees even in the absence of their protected conduct.

It is these issues that I shall now consider. I find that the credited evidence, as detailed above, established a strong and compelling case that Respondent's failure to consider or to hire Zheng and Gao was motivated by animus towards their protected conduct and/or that Respondent's animus towards such protected conduct contributed to its decisions not to consider or hire these employees.

The most significant evidence in support of this conclusion is the credited testimony of Zheng that when she asked Lin why she and Gao were the only former employees not hired, Lin replied, "Why should I hire you... You and Gao Li Rong went to the Union, made a complaint against the company. Why should I hire you?" This response of Lin is a virtual admission that Respondent's decision not to consider for hire or to hire Zheng and Gao was motivated by their union activities. *PBS*, supra, 347 NLRB at 707 (statement by president of company that his refusal to hire employees was to avoid dealing with union); *National Steel Supply*, 344 NLRB 973, 974 (2005) (statement made by official of employer in regard to employee, who had been terminated, "if you want to follow your leader follow him"); *C.P. Associates Inc.*, 336 NLRB 167, 168 (2001) (statement by supervisor involved in hiring that company had "just got rid of your union buddies" and that his boss had informed him that "with you being union, I can't put you on"); *Pacific Custom Materials*, 327 NLRB 75, 84 (1998) (statements made by supervisors that former employees were not hired by potential successor because employer didn't want union back in and another employee was not hired because he was a union steward). Not only do Lin's comments establish that union animus was a motivating factor in Respondent's decisions, but also are sufficient by itself to establish a crucial element of that conclusion – the element of knowledge.

Notably, Respondent argues that the evidence is insufficient to prove that it had knowledge of any protected conduct of either discriminatee and that for this reason alone the Complaint must be dismissed. *Reynolds Electric*, 342 NLRB 156, 157 (2004). I do not agree.

As I have detailed above, Lin's statement to Zheng attributing his reasons for not hiring Zheng and Gao to their protected conduct of going to the Union and complaining about the company, in addition to establishing the reasons for refusal also establishes that Respondent was aware of their protected conduct. *National Steel Supply*, supra, 344 NLRB at 974 (statement made about employees following "leader" (the discriminatee); Board concludes that a reasonable inference from that statement is that the discriminatee was perceived as a leader in the employees' efforts to organize); *General Trailer Inc.*, 330 NLRB 1088 fn. 2 (2000) (statement made to employee by management official that employee had been laid off because he was a ringleader of the union organizing drive, held to be direct evidence of the Respondent's knowledge of discriminatees' union activity).

While I emphasize that this statement by Lin is sufficient by itself to establish the elements of Respondent's knowledge of the protected conduct of the discriminatees as well as the fact that Respondent's decisions not to consider them or to hire them was motivated by such conduct of the employees. I note that the record contains ample other evidence supporting these conclusions.

Thus, it is undisputed that Gao and Zheng discussed among themselves and with other employees their common complaints about various aspects of their employment at Guang Zhou, including complaints about hours, overtime and the fact that management was sharing their tips. Further, as a consequence of these complaints, Zheng and Gao discussed going to the Union about these issues. Zheng, in fact, went to the Union and signed a card, and subsequently both Zheng and Gao spoke to their fellow employees about joining the Union to protect their rights.

In April 2009, Lee, the wife of the owner of Guang Zhou and Lin's sister-in-law, asked if the restaurant Domico was sued by the Union. Gao replied that she wasn't sure, but she thinks that in order to bring a lawsuit you need at least three people. Notably, Domico is the restaurant where Gao's friend, "Sammy," who had informed Gao and Zheng about the Union, was employed. Further, "Sammy" was involved in "cases" with that restaurant as well as with East Buffet Restaurant, where the Union was involved. While the record does not disclose any details of the "case" involving Domico, it does reveal that the Board issued a decision in *East Buffet*, supra, 352 NLRB at 975 in July 2008, wherein violations of the Act were found and included evidence that employees complained about working conditions, such as underpayment of wages, went to the Union about these complaints and a lawsuit was filed against the restaurant.

Thus, it appears that Lee had found out about the Union's involvement in these restaurants as well as the facts that lawsuits were filed and that Gao's friend, "Sammy," who worked at these restaurants, had suggested that Gao and Zheng contact the Union. I find no other logical explanation for the questioning by Lee of Gao about whether the Union sued Domico. Notably, Lee did not testify to either deny or explain why she asked Gao this question.

I also find it likely that since Lee was the sister-in-law of Lin and Lin was a supervisor at Guang Zhou that Lin was made aware of Lee's questioning of Gao about these matters. Thus, these findings provide further evidence of Respondent's knowledge of Gao's involvement with the Union.<sup>9</sup>

The above conclusion (that Respondent was aware of the Union involvement of Gao and Zheng) is fortified by the May conversation between Lin and Zheng. Lin asked Zheng, "Did you do anything wrong to the company?" Before Zheng could respond, Lin added, "I know Gao Li Rong went to the Union and made a complaint against the company." Zheng made no response. Lin continued, "You don't have to say anything. I know." This conversation provides conclusive evidence that Lin was aware of the involvement of both Gao and Zheng with the Union and with complaints against the company (Guang Zhou, where Lin was a supervisor at the time of the conversation).

Shortly, after this conversation, Gao was not present when her brother-in-law and a former employee of Guang Zhou came to the restaurant. Zheng asked Lin if she could give the brother-in-law free coffee. Lin responded that he had already allowed Gao's relative to work at the restaurant and Gao had "went to the Union to make a complaint against me." This remark is further evidence of Respondent's knowledge of Gao's union activity as well as evidence of Respondent's animus towards such activity.

Further, the testimony of Leung, another captain employed by both Guang Zhou and Respondent and a witness called by Respondent, provides further evidence of Respondent's knowledge of protected conduct of the discriminatees. Leung was called as noted by

---

<sup>9</sup> I do not credit Lin's denials that he was unaware of Lee's conversation with Gao. I note again that Lee did not testify.

Respondent as a witness to testify about the alleged deficiencies in the performance of Gao and Zheng, but in the course of that testimony revealed that both Gao and Zheng had complained to him about increasing the amount of their tips and about the fact that Ping, who the employees considered to be a manager, was taking part of their tips. More importantly, Leung testified that he informed Lin about these complaints by Gao and Zheng.

Since it is well settled that complaints made by at least two employees about working conditions constitute protected concerted activities, *The Continental Group*, 353 NLRB 348, 367 (2008); *Dickens Inc.*, 352 NLRB 667, 672 (2008); *North Carolina License Plate Agency*, 346 NLRB 293 (2006); *Hahner Foreman & Harness*, 343 NLRB 1423, 1424 (2004); *Buck Brown Contracting*, 283 NLRB 488, 489 (1987); *JMC Transport*, 272 NLRB 545 fn. 2 (1984), Leung's testimony establishes that Lin was aware that Gao and Zheng had engaged in protected concerted activity by their common complaints about working conditions.

I also note in this regard that Respondent contends that there is no evidence of knowledge of any union or protected activity by the discriminatees while they were employed by Respondent. This argument, while true, is totally irrelevant. Since the allegations are that Respondent refused to consider and to hire Gao and Zheng, and in fact Respondent did not hire them, clearly they could not have engaged in union or other protected conduct while employed by Respondent. Nonetheless, they did engage in such activities while employed at Guang Zhou, where Lin was as supervisor, and most importantly, Lin as an individual was aware that the employees engaged in such activity.

I agree with General Counsel that although the evidence is sufficient, as I have detailed above, to find that Lin was a supervisor while he as employed at Guang Zhou that finding is not crucial in assessing knowledge by Respondent of such activities. It is sufficient to conclude that Lin (whether he was a supervisor at Guang Zhou or not) was aware of the protected conduct of Gao and Zheng while they were employed there. *U Ocean Palace Pavilion*, 345 NLRB 1162, 1172 (2005) (violation found based on refusal to hire and to consider hiring employees to work at one restaurant because employees had engaged in protected concerted activity by filing a lawsuit against another restaurant, where the individual involved in hiring at the new restaurant had been associated with prior restaurant and was aware of the lawsuit.)

Finally, I also note that on June 1, after the employees were notified that the ownership of the restaurant was going to be transferred to Lin and that they would have to file applications for hire with the new owner, the employees met at a different restaurant to discuss the development. Ping was present during their discussions, wherein both Gao and Zheng stated that it was unfair for the employers to close the restaurant and suggested that the employees go to the Union together to get help in obtaining job security. One or two other employees agreed, but most of those present stated that they should wait and see what happens the next day when applications were due. Ping said, "I don't even know if I will be rehired."

While I agree with Respondent that the evidence does not establish that Ping was a supervisor of Respondent, I nonetheless find it likely that Ping informed Lin about the developments at the meeting, particularly that both Gao and Zheng suggested that employees go to the Union together to protest the transfer and to protect the employees' job security. See *East Buffet*, supra, 352 NLRB at 975 fn. 2 (reasonable to infer that captain, whether or not he is a supervisor, informed officials of employer that employees engaged in union activities).

I find it reasonable to infer that Ping so informed Lin because they had worked together as captains at Guang Zhou and the Ping was uncertain whether he was going to be hired by Respondent. I find it probable that Ping, in order to ingratiate himself with Lin, would inform him

that Gao and Zheng were suggesting that the employees complain to the Union to ensure their job security. I therefore do not credit Lin's denials that Ping told him about Gao and Zheng's comments at the meeting, particularly in the absence of any corroborating testimony from Ping.<sup>10</sup>

5

I also find that the fact that Respondent hired the entire work force of Guang Zhou (consisting of approximately 40 employees) except for Zheng and Gao provides further evidence that Respondent's decision not to hire them was discriminatorily motivated.

10

Accordingly, based on the foregoing evidence, I conclude as related above, that General Counsel has established a strong and compelling case that the protected conduct of Gao and Zheng contributed to Respondent's decision not to consider them or to hire them as employees.

15

Where, as here, General Counsel has made such a strong *prima facie* case of discrimination, the burden on Respondent under *Wright Line* to establish that it would have taken the same action absent the employees' protected conduct is substantial. *PBS*, supra, 347 NLRB at 713; *Pacific Custom Materials*, 327 NLRB 75, 84 (1998); *Vemco Inc.*, 304 NLRB 911, 912 (1991).

20

I conclude that Respondent has fallen short of meeting its burden in that regard.

25

Lin testified to a number of reasons why he allegedly decided not to hire or consider for hire Gao and Zheng. I find his testimony was vague, inconsistent and unpersuasive and that it differed substantially from reasons asserted in Respondent's answer and in position papers submitted by its attorney.

30

Lin testified that he did not hire Zheng because she was not diligent, she would go to the bathroom and make a phone call and he (Lin) could not find her. Lin further testified that once Zheng had a verbal argument with a manager and she talked behind people's backs and gossips. Lin provided no details concerning any of these alleged deficiencies in Zheng's performance, and he admitted that he never spoke to Zheng about any of these alleged problems with her work.

35

Respondent also called Wu and Leung, who were also employed as captains at Guang Zhou along with Zheng. Wu testified that Zheng "did not work at her assigned post" and did not get along with some of her co-workers. Wu testified further in support of this assertion that he once was at a party and saw a co-worker crying, and the co-worker told Wu that Zheng (and Gao) were taking advantage of them.

40

Leung testified that Zheng was not "very attentive," she eats while working and "she will argue with co-workers." Respondent's Answer stated that Zheng was not hired because of her "bad service attitude," that she was not nice to work with her co-workers and frequently yelled and screamed at co-workers in front of customers. In its position paper, Respondent's attorney stated that Zheng (as well as Gao) did not have a good attitude or good appearance and that employees had complained directly to Lin that Zheng (and Gao) were lazy and yelled and screamed at the other staff.

45

50

---

<sup>10</sup> Ping, although still employed by Respondent, was not called by Respondent as a witness. I emphasize that although I do rely on this meeting as evidence of Respondent's knowledge of protected conduct of Gao and Zheng, even without considering such evidence, knowledge of such conduct is compelling, as detailed above.

Thus, Lin's testimony that Zheng was not hired because she was not diligent, would go to the bathroom and he could not find her, an alleged verbal argument with a manager and she gossips and talks behind people's backs was not supported by any specifics and was not supported by the testimony of either Wu or Leung and was inconsistent with its answer and position papers. Thus, neither the Respondent's Answer or its position paper, or Leung or Wu, said anything about Zheng going to the bathroom or that she could not be found or that she talks behind people's back or gossips. Although Wu testifies that Zheng did not get along with co-workers, his only substantiation of this assertion was a party that he attended, wherein an employee, who was crying, allegedly told him that Zheng (and Gao) were taking advantage of her. Notably, Wu admitted that he did not tell Lin about this alleged incident and Lin admitted that he did not consult with Wu or any captain before deciding whom to hire.

Leung testified that Zheng was not "attentive" and when she takes orders, she often eats and "often she will argue with co-workers."

Respondent's Answer asserted that Zheng was not hired because she was "not nice" to work with and frequently yelled and screamed at co-workers in front of customers. Its position paper mentioned that Zheng did not have a good attitude, good appearance, was not a team player and many employees complained to Lin that Zheng (and Gao) were not nice, were "lazy" and they yelled and screamed at the other staff.

Thus, while the Answer and position paper asserted that Zheng yelled and screamed at co-workers during working hours and that employees complained directly to Lin about such yelling and screaming, Respondent adduced no testimony from Lin, Leung or Wu or from any employee establishing that Zheng engaged in any such conduct or that any employee complained to Lin about Zheng "yelling" and "screaming" at co-workers in front of customers. Lin's testimony that he did not hire Zheng because she would go to the bathroom, could not be found, she had a verbal argument with a manager and that she talks behind people's backs and gossips do not appear in Respondent's Answer or its position papers and was not substantiated by the testimony of Leung or Wu. Further, Leung's testimony that Zheng "often eats while working" was not mentioned by Lin as a reason for not hiring Zheng and does not appear in either Respondent's Answer or position papers.

Similarly, Lin testified that he decided not to hire Gao because she "spit into the sink at the tea station" and because of her gambling and drinking and because she allegedly told her brother-in-law to make a threat against a co-worker.

With respect to the allegation that Gao "gambled," Lin testified that the gambling by Gao took place at the restaurant while it was not operating and that other employees plus Lin himself would participate in the gambling<sup>11</sup> along with Gao. However, Lin asserts that Gao's gambling affected her work since after she lost money, she "was not happy" and she "would just stand there like no energy."

Leung and Wu to some extent corroborated Lin's testimony by claiming that when Gao gambles "she gets moody" and it affects her work. However, the rest of Lin's testimony with regard to Gao is not substantiated by Leung or Wu and/or is inconsistent with its Answer and position paper.

---

<sup>11</sup> The gambling consisted of playing mahjong and pica.

Leung did partially corroborate Lin's testimony by claiming that Gao would spit in the drinking fountain<sup>12</sup> and in fact, asserted that he spoke to Gao about it and told her not to do it because it is used by other people. However, neither Respondent's Answer nor its position papers make any reference that she spit into the sink or the drinking fountain as a reason for not hiring her.

Further, with respect to Lin's assertion that another reason for his decision not to hire Gao was her allegedly telling her brother-in-law to threaten a co-worker. Lin admitted that he never actually heard Gao instruct her brother-in-law to threaten a co-worker. More importantly, neither Respondent's Answer nor its position papers makes any references to this alleged conduct of Gao as a reason for Respondent's decision not to hire her.

In that regard, the position papers referred to reasons for not hiring Gao (as well as Zheng) as their lack of good appearance and that employees complained to Lin directly that Gao (and Zheng) "yelled" and "screamed" at other staff. Lin furnished no testimony concerning any "yelling" or "screaming" by Gao at other employees or that employees had made complaints to him about Gao's allegedly engaging in such conduct. Nor did Wu or Leung testify about any such behavior by Gao.

Most importantly, in both the Answer and in its position paper, Respondent asserted that one of the reasons for its failure to hire Gao was her failure to present or possess proper legal documentation to work in the United States. These documents further assert that her employment authorization was to expire on January 15, 2010 and she could not provide two pieces of identification to legally work in the United States. However, Respondent adduced no testimony that this alleged conduct by Gao was considered by Respondent in deciding not to hire her. In fact, the parties stipulated that Gao submitted to Respondent when she applied a social security card and an employment authorization card from the US Department of Homeland Security, which expired on January 15, 2010.

The above description of Respondent's purported reasons for not hiring or considering hiring Zheng or Gao demonstrate that they do not withstand scrutiny. The evidence consisted of vague, conclusionary, inconsistent and unpersuasive testimony of Lin as well as Wu and Leung.

Most significantly, the record demonstrated significant differences between the reasons for Respondent's decisions asserted in its position papers and Answer and the reasons provided by Respondent's witnesses in their testimony at trial. It is well established that position papers and answers submitted by parties are admissible and can be construed as admissions. *Evergreen America*, 348 NLRB 178, 187 (2006); *Tarmac America*, 342 NLRB 1049 (2004); *Smucker*, 341 NLRB 35, 38, 40 (2004); *Black Entertainment Television*, 324 NLRB 1161 (1997).

Thus, where as here, Respondent's position papers and Answer reveal significantly different reasons for Respondent's decision than Respondent asserted in its testimony, it substantially detracts from the validity of Respondent's defense. *PBS*, 397 NLRB at 715. "The Board has long expressed the view that when an employer vacillates in offering a rational and consistent account of its action an inference may be drawn that the real reason for its conduct is not among those asserted." *Smucker*, supra, 341 NLRB at 40, quoting *Black Entertainment Television*, supra 324 NLRB at 1161 and *Sound One Corp.*, 317 NLRB 854, 858 (1995); *Steve Aloï Ford*, 179 NLRB 229, 230 (1969).

<sup>12</sup> I note however that Lin testified that Gao would spit in the sink at the tea station and not the drinking fountain as testified by Leung.



It is also well settled that the asserted reasons for the discipline (or as here the refusal to hire) fails to withstand scrutiny, the Board may infer that there is another reason – an unlawful one, which the employer seeks to conceal – for the discipline. *Smucker*, supra; *Painting Co.*, 330 NLRB 1000, 1001 fn. 8 (2000); *Shattuck Denn Mining Co.*, 362 F.2d 466, 490 (9<sup>th</sup> Cir. 1966).

I find such an inference appropriate here, particularly in view of compelling evidence of discriminatory motivation, described above. I also rely on the testimony of Leung, as noted, Respondent's own witness. In connection with testimony about the "attitude" of Gao and Zheng, he in fact reinforced my conclusion that their protected conduct motivated the decision of Respondent not to hire them. Leung noted that both employees complained to him about tips and their assertion that Ping (a manager in their view) was sharing in their tips. Leung testified that he reported these complaints to Lin and that he (Leung) started to hate Gao and Zheng because of their constant complaints. He elaborated that employees should just do their jobs, and he admits that he told Zheng "not to go and join Gao to mess around with the company. It's going to affect other employees' attitude."

While I concede that the record does not establish that Leung was a supervisor or agent of Respondent, I nevertheless find it appropriate to consider his testimony, as detailed above, because it concisely summarizes what I consider to be a confirmation of Lin's view concerning the activities of Gao and Zheng.

Thus, the employees were engaging in protected conduct by complaining about working conditions and were trying to enlist other employees to join them in their complaints and to go to the Union to help them alleviate these complaints. This result was precisely what Lin and Respondent was trying to avoid and the evidence discloses as why it chose not to hire Gao and Zheng when it hired all the other former employees of Guang Zhou.

Accordingly, based upon the foregoing analysis and authorities, I find that Respondent has fallen far short of meeting its burden of proof that it would not have hired (or considered for hire) Gao and Zheng absent their protected conduct. It has therefore violated Section 8(a)(1) and (3) of the Act.

### **Conclusions of Law**

1. Respondent, Ji Shiang Inc., is an Employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Local 318, Restaurant Workers' Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to hire or consider for hire Xiao Hong Zheng (Zheng) and Li Rong Gao (Gao) because they engaged in activities in support of the Union and because they engaged in other protected concerted activities, Respondent has violated Section 8(a)(1) and (3) of the Act.

4. The above unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

## REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

I shall recommend that Respondent be ordered to offer Zheng and Gao employment to the positions for which they applied<sup>13</sup> and make them whole for any loss of earnings or benefits as a result of Respondent's refusal to hire them as computed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950) with interest as prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

Based upon the above findings of fact and conclusions of law and on the entire record, I issue the following recommended:<sup>14</sup>

## ORDER

The Respondent, Ji Shiang Inc., Flushing, New York, its officers, agents and successors and assigns shall:

1. Cease and desist from

a. Failing and refusing to hire or consider for hire applicants for employment because they engaged in activities in support of Local 318, Restaurant Workers' Union (the Union) or because they engaged in other concerted activities protected by the Act.

b. In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

a. Within 14 days from the date of this Order, offer Li Rong Gao and Xiao Hong Zheng employment in the positions for which they applied, or, if those positions no longer exist, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges.

b. Make Li Rong Gao and Xiao Hong Zheng whole for any loss of pay and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

c. Within 14 days from the date of this Order, remove from its files any reference to the unlawful refusal to hire, and within 3 days thereafter notify Li Rong Gao and Xiao Hong Zheng that this has been done and that the refusals to hire will not be used against them in any way.

d. Preserve and, within 14 days of a request make available to the Board or its agents

---

<sup>13</sup> Captain for Zheng and waitress for Gao.

<sup>14</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

for examination, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

5

e. Within 14 days after service by the Region, post at its place of business in Flushing, NY, copies of the attached notice marked “Appendix.”<sup>15</sup> Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and applicants are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 2, 2009.

10

15

20

f. Within 21 days after service by Region 29, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., September 20, 2010.

25

\_\_\_\_\_  
Steven Fish,  
Administrative Law Judge

30

35

40

45

<sup>15</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

50

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT fail or refuse to hire or to consider for hire applicants for employment because they engaged in activities in support of Local 318, Restaurant Workers' Union (the Union) or because they engaged in other concerted activities protected by the Act.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their Section 7 rights protected by the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Li Rong Gao and Xiao Hong Zheng employment in positions for which they applied or if those positions no longer exist, to substantially equivalent positions, without prejudices to their seniority and other rights and privileges.

WE WILL make Li Rong Gao and Xiao Hong Zheng whole for any loss of pay and other benefits with interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire Li Rong Gao and Xiao Hong Zheng and, within 3 days thereafter, notify them in writing that this has been done and that the refusal to hire them for employment will not be used against them in any way.

JI SHIANG, INC.

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

Two MetroTech Center, Jay Street and Myrtle Avenue, Suite 5100  
Brooklyn, New York 11201-4201  
Hours: 9 a.m. to 5:30 p.m.  
718-330-7713

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 718-330-2862.